Supreme Court, U.S.

No. 051457 MAR 18 2006

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

WILLIAM EDGAR BOWEN, JR.,
Petitioner,

versus

COMMONWEALTH OF KENTUCKY,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Kentucky

---

PETITION FOR A WRIT OF CERTIORARI
With Appendix

JOHN K. CARTER
Law Office of John K. Carter
2311 S. Hwy. 53
P.O. Box 205
LaGrange, KY 40031
Telephone (502) 225-0202
Facsimile (502) 225-6021
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED FOR REVIEW

I. Are the 6th and 14th Amendments to the United States Constitution violated when a Defendant is denied a timely and proper motion to continue his case for trial to obtain a new expert witness due to the death and absence of the defendant's expert witness who died two days prior to the commencement of the trial who would have presented relevant evidence to refute charges of sexual abuse and sodomy.

LIST OF PARTIES

The parties to the proceedings below were William Edgar Bowen, Jr. and the Commonwealth of Kentucky.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1-2
STATEMENT OF THE CASE	2-14
REASONS FOR GRANTING THE WRIT	14-22
CONCLUSION	22
APPENDIX	A1-A13

TABLE OF AUTHORITIES

PAGE

Cases:

Commonwealth v. Craig, 783 S.W.2d 387 (Ky. 1990) 20
Commonwealth v. Rose, 725 S.W.2d 588 (Ky. 1987) 20
Crane v. Kentucky, 476 U.S. 683 (1986) 18
Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993) 4, 10, 16, 21
Dyer v. Commonwealth, 816 S.W.2d 647 (Ky. 1991) 20
Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985) 3, 15, 20
Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997) 17, 21
Tungate v. Commonwealth, 901 S.W.2d 41 (Ky. 1995) 20, 21
United States v. Cross, 928 F.2d 1030 (11th Cir. 1991) 17
U.S. v. Romero, 189 F.3d 576, 581-588 (7th Circuit 1999) 16, 17, 18

Constitutional Provisions:

6th Amendment, U.S. Constitution 1, 3, 17, 18, 19
14th Amendment, U.S. Constitution 2, 18, 19
Section 11 of the Kentucky Constitution 3
28 U.S.C. section 1257(a) 1

Statutes and Court Rules:

Kentucky Rules of Criminal Procedure (RCr) 9.04 2

William Edgar Bowen, Jr., Petitioner herein, respectfully prays that a writ of certiorari issue to review the memorandum opinion of the Supreme Court of Kentucky, rendered in the above-entitled case on September 22, 2005.

OPINION BELOW

The opinion of the Supreme Court of Kentucky from which review is sought appears in the Appendix, pages A1-A12, (App., pp. 1-12) to this petition and is an unreported memorandum opinion styled *Bowen v. Commonwealth*, Ky., 2003-SC-0744-MR.

STATEMENT OF JURISDICTION

The memorandum opinion of the Supreme Court of Kentucky was rendered on September 22, 2005. A copy of that decision appears at App. A1-A12.

A timely petition for rehearing was denied by the Kentucky Supreme Court on December 22, 2005. A copy of the order denying rehearing appears at App. A13.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

6th Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

14th Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Raising the Federal Constitutional Question

Question I – Trial counsel, in conformity with Kentucky Rule of Criminal Procedure (RCr) 9.04 tendered a motion to continue petitioner's case for trial due to the absence of Dr. Richard Gardner, petitioner's expert witness, on the ground that Dr. Gardner had become extremely ill just prior to trial, notifying trial counsel of his condition. Dr. Gardner, unknown to trial counsel, died Sunday, May 25, 2003, two (2) days prior to the scheduled trial, May 27, 2003. After hearing, the trial court, noting that failure to allow a continuance to obtain another expert was most likely reversible error, overruled petitioner's motion for a continuance opining, in pertinent part, that based on Dr. Gardner's written report, Dr. Gardner's "...testimony is so outside the realm of the proof required to show that these crimes were committed and that the defendant committed them, [they] should not under any circumstances be admissible." (State Transcript of Proceedings, Volume I, pages 25, 3-34; hereinafter, "TP, Vol. ___, pp. ___")[1]

---

[1] Petitioner's trial record is maintained as part of the official record on appeal. Petitioner's trial was recorded by a court stenographer. The transcript of the trial is a part of the official record on appeal. Citations to the transcript of proceedings conform to the volume and page number.

Trial counsel objected to the trial court's denial of his motion to continue referring to the dissenting opinion of former Kentucky Supreme Court Justice, Charles M. Leibson, in the case of *Pendleton v. Commonwealth*, Ky., 685 S.W.2d 549 (1985) in which Justice Leibson opined against the exclusion of similar evidence on the ground that *Pendleton* had a constitutional right to refute the testimony against him citing the 6th Amendment to the United States Constitution and Section 11 of the Kentucky Constitution. *Pendleton*, supra, at 555. Trial counsel orally argued against the trial court's ruling as follows:

> "The reason we want to call Dr. Gardner is for his testimony that Mr. Bowen's mental condition is not one that is the kind that would commit this kind of offense.
>
> And like Judge Leibson says in his dissent, which I think is going to be the law in the state of Kentucky, is that that denies him the right to present a defense to a bare allegation that he committed the offense of sodomy and sexual abuse otherwise it becomes a swearing match.
>
> And I think, as Justice Leibson said, that it is admissible. And there is no way I can hold an adequate *Daubert* hearing without Dr. Gardner here or someone else here to testify. Because I have no way of adequately cross-examining Mr. Raley's witness." (TP, Vol. I, p. 22)

Trial counsel also raised this constitutional issue on appeal to the Supreme Court of Kentucky. The Kentucky Supreme Court addressed this issue in its Opinion, opining:

> "Appellant now argues that failure to grant his motion for continuance denied him his constitutional right to present evidence to refute the charges against him. Ky. Const. § 11; U.S. Const., Amends. VI, XIV. He also argues that the court erred in not holding a

Daubert hearing on the admissibility of Dr. Gardner's testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993). We disagree." (App., p. 9)

B. Material Facts

Petitioner, William Edgar Bowen, Jr., was convicted of sexual abuse in the first degree and sodomy in the first degree as charged in the indictment filed in the Bullitt Circuit Court (State Transcript of Record, Volume I, pages 15-16; Volume V, pages 694-696, hereinafter "TR Vol. __, pp. ___")[2] based solely on the uncorroborated testimony of the alleged victim Jennifer Smothers (hereinafter "JS") whose testimony prior to and during trial were contradictory, incredible and inherently improbable as to both charges (TP, Vol. I, pp. 105-144; TP, Vol. II, pp. 25-40) In fact, J.S. completely denied and contradicted the testimony of the investigating officer, Trooper Tapp, on the existence of the factual basis for the offense of Sexual Abuse in the First Degree (TP Vol. II, pp. 25-27). Petitioner had no prior convictions. (TR, Vol. V, pp.697-701).

Petitioner, William Edgar Bowen, Jr., and his wife Myrtle Bowen were married in May of 1971 after Mr. Bowen returned from military service and were married at the time of the alleged incidents and the trial herein and remain married at this time. (TP Vol. IV, p. 56) For eighteen (18) years prior to the trial, Mr. Bowen worked full time at Olympic Stain as a paint mixer mostly on the second shift. (TP Vol. IV, pp. 52, 61). During this period of time Mr. Bowen also worked at odd jobs during the day when he was working the second shift at Olympic Stain

---

[2] All written pleadings, opinions and other documents are maintained as part of the record on appeal which is officially referred to as the "Transcript of Record." Citations to the Transcript of Record conform to the volume and page number.

that began at 3:45 p.m. and lasted to 12:30 a.m. or later if he worked overtime. He worked part-time at Highland Memorial Gardens Cemetery to earn extra money from 7:30 a.m. until 12:00 p.m. (TP Vol. IV, pp. 63-64). When Mr. Bowen did not work during the day, he would eat lunch between 11:00 a.m. and 12:00 p.m. and would leave his home in Mt. Washington, Kentucky, at approximately 2:45 p.m. before the second shift started at 3:45 p.m. When he did work day shift at Olympic Stain, the first shift hours were from 7:00 a.m., requiring him to leave home at 6:00 a.m., and ended at 3:45 p.m., on most occasions, arriving back home in Mt. Washington after 4:00 p.m. (TR Vol. IV, pp. 65-67).

To make extra money, his wife, Myrtle, cared for children of the local community whose parents worked, including the children of two (2) school teachers who also schooled the alleged victim, JS, as a student in their classrooms (TR Vol. II, pp. 145-154). JS, was cared for by Mrs. Bowen in her home from age two (2) to age twelve (12) and she continued to visit the home until her last visit in December, 2001, with no allegations of any improprieties. (TP Vol. I, 117-118).

On March 27, 2002, some three (3) months after the Christmas visit, JS, was interviewed by Trooper Tapp of the Kentucky State Police and Mary Ellen Murray, a social worker, at the offices of the Cabinet for Families and Children in Bullitt County, Kentucky for approximately two (2) hours concerning allegations she made to her mother about sexual abuse and sodomy that allegedly occurred when she was five (5), six (6), or seven (7) years old allegedly perpetrated by Mr. Bowen at the Bowen home. At the conclusion of this interview, JS wrote out her own handwritten statement which was introduced at trial into the record as "Defendant's Exhibit #2" in which she specifically writes that Mr. Bowen masturbated on her stomach

but makes no mention of any other inappropriate act. (TP. Vol. I, pp. 134-135). At trial, JS admitted that at no time did she ever tell Mrs. Bowen or her mother about the alleged incidents until after a conversation with a peer, "Nicki", who told her own mother who in turn related the alleged incident to JS' mother (TP Vol. I, pp. 117, 130).

Numerous other witnesses, whose children were kept by Mrs. Bowen at her residence, all testified on behalf of Mr. Bowen that neither their children, nor they, ever saw anything or heard anything inappropriate regarding Mr. Bowen and his relationship with JS or, for that matter, any other child, and that he was always appropriately dressed around the children. (TP Vols. II, III and IV). One witness, a school bus driver who picked up and delivered the children to and from the Bowen residence for school, testified that JS was one of the children she transported, that she had been trained to spot indications of sexual abuse in the school children she transported and that JS never, on any occasion, exhibited any of the indications of abuse she had learned. (TP Vol. II, pp. 140-144). Another witness, Lisa Renee Stewart, has a son who had been a victim of sexual abuse, whom she placed in Mrs. Bowen's care while she worked at Jewish Hospital in Pediatrics as a visiting nurse. She, knowing the symptoms of sexual abuse in a child, testified that she observed none of those indications in JS, whom she knew due to her contact with the Bowen family through her children. (TP Vol. IV, pp. 22-25). Both teachers, whose children were also kept by Mrs. Bowen and who had taught JS in their classrooms, testified that they were trained to be aware of and observant for indications of abuse in children, and they did not at any time observe any of these characteristics in JS. As important, both testified that their children told them everything that happened at the Bowen home and that there was never any mention of any inappropriate statements or

acts by Mr. Bowen and that neither they nor their children ever observed Mr. Bowen inappropriately dressed. (TP, Vol. II, pp. 145-154).

On March 27, 2002, after interviewing JS, Trooper Tapp and Mary Ellen Murray went to the Bowen residence where Detective Tapp, after approximately two (2) hours of ongoing interrogation of Mr. Bowen, took a taped statement from Mr. Bowen. Trooper Tapp's version of the interrogation and Mr. Bowen's testimony regarding the interrogation differ markedly. Trooper Tapp testified that he took Mr. Bowen aside to the bedroom and asked Mr. Bowen if he had any "green shorts" (supposedly those that JS alleged Mr. Bowen wore around the house in front of the children and at the time of both the alleged sodomy and the alleged sexual abuse and which, incredibly, would then have been more than seven (7) to ten (10) years old). Mr. Bowen testified that Trooper Tapp had asked to see his underwear and that he initially thought he meant those he had on but realizing his mistake showed him jockey briefs. (TP Vol. IV, pp. 73-75). Then Tapp asked if he had any green boxer shorts and Mr. Bowen showed him his green "swimming trunks." Trooper Tapp testified that he toured the house before taking Mr. Bowen's taped statement and that he conducted no interrogation prior to taking the statement (TP, Vol. II, pp. 45-47; 53-54, 57). The green trunks were not taken for evidence by Tapp. (TP, Vol. II, pp. 54-56, 67).

Trooper Tapp's investigative time log, however, belies his testimony and verifies Mr. Bowen's version of the interrogation and taped statement. The time log shows that Trooper Tapp and Ms. Murray arrived at the Bowen residence on Flatlick Road in Mt. Washington, Kentucky, at 13:49 hours (1:49 p.m.) and left the residence at 15:56 (3:56 p.m.). The taped statement was taken from 15:45 to 15:55 (3:45 p.m. to 3:55 p.m.), after over one and one half

hours of interrogation by Trooper Tapp, according to Mr. Bowen, whose testimony is verified by Tapp's time log. (TR Vol. II, pp. 65-67). During this period of time, Mr. Bowen testified that Trooper Tapp repeatedly suggested numerous different scenarios under which it may have been possible that JS accidentally observed him in a compromising position. (TP Vol. IV, pp. 100-101) Mr. Bowen admitted no crime and denied any inappropriate contact with JS on the tape and no verbal admissions were made by Mr. Bowen to Tapp (TP, Vol. II, pp. 53-54).

During Tapp's interrogation, Mr. Bowen thought that Trooper Tapp was discussing some recent occurrence on JS's last visit to the Bowen home in December of 2001 (due to the discussion of Playboy magazines and Tapp's reference to Matthew's and Aaron's bedroom) of which he had no knowledge but assumed, based on Tapp's questioning, that he had been observed by JS in some compromising position (masturbating) without his knowledge. Mr.Bown testified that Tapp never advised him of the allegations made by JS or the time of their alleged occurrence. (TP, Vol. IV, pp. 77-80) During cross-examination Trooper Tapp finally admitted that he probably did not advise Mr. Bowen of the charges or the time of their alleged occurrence. (TP Vol. II, pp. 67-69).

Trooper Tapp continued to deny, however, any interrogation of Mr. Bowen prior to the taped statement or making any suggestions concerning any inappropriate activity that JS may have 'accidentally' observed in the form of masturbation by Mr. Bowen without Mr. Bowen's knowledge. The prosecutor's questioning of Mr. Bowen proved otherwise. The prosecutor asked Mr. Bowen on cross-examination, "Did you start crying in that bedroom?" (TR Vol. IV, p. 118-119). There were only two (2) people in the bedroom that could have known whether or not Mr. Bowen began crying, Trooper Tapp and Mr. Bowen. Trooper Tapp

testified that he only went into the bedroom for Mr. Bowen to show him his "green shorts" (swimming trunks). The question asked by the prosecutor was obviously prompted by Trooper Tapp, who was sitting at counsel table during the trial and who was now recounting the true events that occurred in the bedroom resulting from his intense interrogation of Mr. Bowen. (TP, Vol. IV, pp. 118-119).

Prior to the trial, counsel for Petitioner moved the trial court in limine to suppress the taped statement taken by Trooper Tapp on the grounds it contained no incriminating statements and was offered by the Commonwealth for the sole purpose of inflaming the jury against Mr. Bowen, and had absolutely no probative value to the issues involved in the case. Hearing was held on Petitioner's motion, (TR Vol. I, pp. 91-92; TR Vol. IV, pp. 484-497), which the trial court denied December 3, 2002 (TR Vol. II, p. 196). Just prior to trial, Petitioner again moved the trial court in limine to exclude the taped statement, which was again overruled by the trial court. (TP Vol. I, pp. 41-42).

During voir dire, Petitioner's counsel attempted to play the tape to the venire in an effort to ensure Petitioner a fair and impartial jury unaffected by the inflammatory and irrelevant content of the tape. More particularly, to inquire of the venire whether any potential juror who would otherwise believe from the evidence that Mr. Bowen was not guilty of the offenses charged, would find him guilty anyway based solely on the taped statement, which contains no confession and no statements that even relate to the time period of the alleged acts. The trial court refused to permit Petitioner's counsel to play the tape even though the Court had previously ruled the tape admissible as evidence. (TP Vol. I, pp. 85-86). Again in his opening statement, Petitioner's counsel attempted to play the statement to the jury in an attempt to diffuse its prejudicial effect. This effort was again thwarted by the trial court even

though the prosecutor had already referred to the taped statement in his opening statement. (TP Vol. I, pp. 95, 99). Finally, the trial court permitted the prosecutor to play the taped statement to the jury in his case in chief over the objection of Petitioner's counsel to the undue prejudice of the Petitioner. (TP Vol. II, pp. 46-47)

Prior to the trial, Petitioner's counsel arranged for an examination of Mr. Bowen by Dr. Richard A. Gardner, a highly renowned psychiatrist and clinical professor of psychiatry, Division of Child Psychiatry at Columbia University, College of Physicians and Surgeons, specializing in the field of sexual behavior and child sexual abuse, to testify that pedophilia is a medically recognized sexual disorder classified in the *American Psychiatric Diagnostic and Statistic Manual, Section 302.2 Pedophilia, 2000*, and that given petitioner's mental condition based on his evaluation, it would be highly unlikely that he would commit any pedophilic act including the one with which he was charged. (TR Vol. II, pp. 208 - 218). The trial court entered an Order finding that a *Daubert* hearing was necessary and required to determine whether the proffered scientific testimony by Dr. Gardner met the *Daubert* criteria for admissibility. *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993) The *Daubert* hearing was scheduled the morning of trial. (TR Vol. III, pp. 356-357, 360).

On Saturday, May 24, 2003, Dr. Richard Gardner contacted Petitioner's counsel and advised that he was in extreme pain due to an operation on his foot and that he was physically unable to attend the *Daubert* hearing scheduled for the morning of trial May 27, 2003, but that he would be able to testify by telephone. On Sunday, May 25, 2003, Dr. Gardner again contacted Petitioner's counsel and advised that he was in such extreme pain the he would not be able to give testimony by telephone as previously ad-

vised. Counsel for Petitioner immediately prepared an appropriate RCr 9.04 motion with accompanying Affidavit to reassign the case for trial, which was faxed to the prosecutor May 25, 2003, setting out the condition of Dr. Gardner (Reflex Sympathetic Dystrophy, RSD) and that he would be unable to attend or give his testimony by telephone due to his condition. Petitioner's counsel filed his Affidavit in support of the RCr 9.04 motion which also included Dr. Gardner's testimony that pedophilia is a medically and scientifically recognized condition with characteristics capable of evaluation and identification by qualified experts including himself as set forth in his curriculum vitae, that Mr. Bowen does not and did not have a pedophilic disorder and that in his opinion it is highly unlikely that Mr. Bowen perpetrated the alleged pedophilic acts on JS. Petitioner's counsel also set out in his Affidavit Dr. Gardner's testimony that based on his expertise, experience and training as a licensed, practicing psychiatrist and professor of psychiatry, that masturbation is not deviate sexual behavior, and is not indicative of an inclination or proclivity of any kind of sexual abuse, more particularly as in this case, the sexual abuse of a five to seven year old girl. (TR Vol. III, pp.415-445). The trial court denied Petitioner's motion. (TR Vol. III, pp. 415-445) Later on the morning of trial, and while the trial court was considering Petitioner's RCr 9.04 motion for continuation, Petitioner's counsel was notified that Dr. Gardner had in fact died Sunday, May 25, 2003, and that it would be necessary for trial counsel to obtain another qualified expert to testify on behalf of his client. After argument, the trial court, noting that failure to allow a continuance to obtain another expert was most likely reversible error, again denied Petitioner's Motion for a continuance effectively denying Petitioner a defense to the bare, uncorroborated allegations of a fourteen-year-old girl, approximately seven (7) to ten (10) years after the alleged incident. (TP Vol. I, pp. 3-

34). Dr. Gardner's testimony was material and essential to Petitioner's defense, and most certainly would have, at the very least, overcome the prejudicial effect of Petitioner's taped, albeit irrelevant, statement.

At trial, JS testified inconsistently, making statements contrary to prior statements she made to Trooper Tapp, as well as contradictory and inconsistent material statements during her trial testimony concerning the alleged sexual abuse and sodomy. JS failed, in response to the prosecutor's questioning, to recount any of the alleged facts the Commonwealth had relied on to indict and prove the offense of Sexual Abuse in the first degree, which prompted another motion by Petitioner's counsel to suppress the taped statement. (TP, Vol. II, pp. 3-5). The prosecutor, concerned that he had not proven the elements of Sexual Abuse I, recalled JS in an attempt to rehabilitate her testimony by reading from Trooper Tapp's notes over Petitioner's objection. (TP, Vol. II, pp. 25-26). JS vehemently denied telling Trooper Tapp that Mr. Bowen had "stuck his finger up [her] butt", (TP, Vol. II, pp. 25-26) and that Trooper Tapp must have misunderstood her. (TP, Vol. II, pp. 27). JS' testimony at trial and statements to Trooper Tapp were so inconsistent, conflicting, inherently improbable, and incredible concerning the alleged sexual abuse and sodomy so as to have little or no probative value sufficient to sustain the jury verdict of guilt on either charge without corroboration, of which there was none. (TP, Vol. I, pp. 105-142).

J.S.'s uncorroborated testimony concerning each of the allegations in the indictment differed significantly in each version from her statements to Trooper Tapp, to her testimony on Day One of the trial, and again in her testimony on Day Two of the trial. The contradictory details of her testimony are significantly different and when put together and seen as a whole clearly showed a child who has told a fictional story and cannot repeat the "facts" of the story

the same way twice. Most telling is her complete failure to recall she had told Trooper Tapp that Mr. Bowen had "stuck his fingers up her butt", which she blames on a misunderstanding on the part of Trooper Tapp, a trained investigator. Also as significant is the deterioration of her account of the sodomy from occurring at age four (4) as stated to Trooper Tapp, to age six (6) or seven (7) at trial. She told Trooper Tapp that Mr. Bowen asked her to "do it again" at age six (6) and testified to that age on Day One of the trial. On Day Two she changed her testimony to a more believable age of twelve (12), specifically denying that she had ever told Tapp or testified on Day One that her age was six (6) at the time Mr. Bowen allegedly asked her to "do it again." (TR, Vol. I, pp. 33-38, 41-42, 140; TR, Vol. II, 25-42, 77-78; TP, Vol. I, pp. 105-144; TP, Vol. II, p. 18, 20, 25, 28-29, 45-67; TP, Vol. IV, pp. 51, 98-99; TP, Vol. VI, p. 3)

Petitioner's counsel moved the Court for a directed verdict at the close of the Commonwealth's evidence on the grounds of the insufficiency of the evidence to support Petitioner's convictions as a matter of law for Sexual Abuse in the first degree and Sodomy in the first degree (TP II, pp. 77-78) and again at the conclusion of all proof. (TP Vol. VI, p. 3). Both motions were denied by the trial court.

The jury first returned a verdict of "guilty" for the offense of Sexual Abuse in the first degree. (TP VI, p. 67). After further deliberation the jury returned a verdict of guilty on the charge of Sodomy in the first degree. (TP VI, pp. 68-69).

Prior to the penalty phase, Petitioner waived sentencing by the jury to permit the Court to sentence the Petitioner in accordance with a recommendation by the prosecutor of the minimum sentence of twenty (20) years. (TP Vol. VI, pp. 72-80).

The Trial Court entered its judgment of conviction and sentence of imprisonment on September 11, 2003, convict-

ing Petitioner in accordance with the findings of the jury and sentencing the Petitioner as follows:

- Sexual Abuse, First Degree – Five (5) years in state penitentiary
- Sodomy, First Degree – Twenty (20) years in state penitentiary

Both sentences were ordered served concurrently. (TR V, pp. 694-696)

The Kentucky Supreme Court affirmed petitioner's convictions and sentence by an unpublished memorandum opinion styled *Bowen v. Commonwealth*, Ky., 2003-SC-0744-MR (App., pp. A1-A12) Petitioner's motion for rehearing was denied December 22, 2005 (App., p. A13).

REASONS FOR GRANTING THE WRIT

(a) The 7th Circuit United States Court of Appeals has decided the issue of the admissibility of evidence like that proffered by Dr. Gardner contrary to the decision of the Kentucky Supreme Court in this case.

This case raises significant constitutional questions about the permissible scope of expert testimony in sexual abuse cases in defense of allegations in cases otherwise indefensible except by denial. This is particularly an important issue in cases similar to petitioner's case where the allegations are made some 6-7 years after the fact by a minor whose testimony is, at best, inconsistent, if not incoherent. The best the Kentucky Supreme Court could say about J.S.'s testimony was that although it was inconsistent and contradictory it did make out the elements of the offense. (App., p. A10)

It is also important to note here that Dr. Gardner's testimony was proffered for two reasons. The first was to offer testimony about the characteristics of pedophilia which, as noted previously, is recognized by the American

Board of Psychiatry as a mental condition. Second, Dr. Gardner was also called by trial counsel to testify in refutation of the highly inflammatory taped statement which contains numerous provocative references to masturbation by the petitioner but admits none of the elements of the offense. Neither the trial court nor the Kentucky Supreme Court addresses the admissibility of Dr. Gardner's testimony for this purpose.

The taped statement was introduced by the prosecutor for two obvious reasons. First, to inflame the jury against the petitioner and second, to infer that petitioner engaged in deviate sexual acts indicative of one that would commit the offenses charged. The testimony proffered by Dr. Gardner is clearly within the realm of the scientific knowledge and expertise of any mental health care professional, particularly one of Dr. Gardner's expertise. This testimony was obviously (1) admissible and necessary to refute the uncooberated testimony of J.S. and (2) necessary to refute the prejudicial and inflammatory nature of the taped statement. The fact situation in this case is similar to the Kentucky case of *Pendleton v. Commonwealth*, Ky., 685 S.W.2d 549 (1985) in which Justice Leibson opined, in his dissent, that such evidence was necessary to refute similar evidence of other sexual acts. *Pendleton*, supra, at 555.

Dr. Gardner, had he been available and permitted to testify, would have testified, in pertinent part, to the following which is a part of his written report reviewed by the trial court in making its decision denying petitioner's motion for a continuance:

> "A list of characteristics of pedophiles, each of which has varying degrees of confirmation in the scientific literature. These are the characteristics that most competent examiners look for when evaluating a person for the presence of pedophilic tendencies. The characteristics here are not a profile, nor is there such

> a thing as a profile for pedophilia. Rather, it is a list of indicators to be matched against those indicators seen in normal people as well as those indicators seen in confirmed pedophiles. This evaluative protocol follows the medical model of assessment.
>
> The references in the scientific literature on which these differentiating criteria are based are to be found in my book, *Protocols for the Sex-Abuse Evaluation* (Creative Therapeutics, Inc., 1995)." (TR, Vol. IV, pp. 527)

Facially, this testimony meets all of the *Daubert* criteria including acceptance in the scientific community.

Similar testimony has been admitted by federal courts through experts whose expertise was gained by experience as opposed to the education, training, expertise and caliber of knowledge and experience of Dr. Gardner. In *U.S. v. Romero*, 189 F.3d 576, 581-588 (7th Circuit 1999); certiorari denied at 529 U.S. 1011 (2000), the 7th Circuit United States Court of Appeals permitted an FBI expert on child molesters, Agent Kenneth V. Lanning, to give expert testimony for the government detailing characteristics and methods of preferential child molesters. In analyzing *Daubert*, supra, the *Romero* Court approved Agent Lanning's testimony in which he "...used a **profile** of the four major 'characteristics' of a preferential sex offender, he focused primarily on the behavior and actions of such offenders to explain their techniques or modus operandi. Agent Lanning was permitted to describe each of the four 'traits' in terms of behavior..." *Romero*, supra at 587. (Emphasis added) There is little difference in what the *Romero* Court authorized under its application of the *Daubert* criteria and the proffered testimony of Dr. Gardner, other than Dr. Gardner's clearly superior qualifications as an expert on the subject.

The *Romero* Court also noted that Agent Lanning had been permitted to testify similarly in other cases for the

government citing *United States v. Cross*, 928 F.2d 1030 (11th Cir. 1991). *Romero*, supra, at 584. One of the issues the *Romero* Court addressed was whether Agent Lanning's testimony violated Federal Rule of Evidence 704(b) which prohibits testimony on the "ultimate issue." *Romero*, supra, 585-586. Even this should not have posed a problem to the Kentucky Supreme Court which abandoned the "ultimate issue" prohibition in *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 891 (1997).

It is axiomatic that if such evidence is permissible in the prosecution of a criminal case, its denial to a criminal defendant to refute the charges and evidence against him most assuredly rises to a violation of his 6th Amendment right to compulsory process for witnesses to testify in refutation of the charges against him and in violation of his 14th Amendment guarantee to a fundamentally fair trial. Clearly, Dr. Gardner's testimony identifying the characteristics of a pedophile was admissible to refute the charges against petitioner. Also, as in *Romero*, supra, he, like Agent Lanning, should have, had he not died, been allowed to opine to hypothetical questions posed by trial counsel that correspond to the characteristics of pedophilic behavior, or lack thereof. *Romero*, supra, 586. Finally, given Kentucky's abandonment of the "ultimate issue" prohibition, Dr Gardner's opinion, had he been available, as to whether petitioner specifically met the characteristics of a pedophile and whether he was likely or unlikely to have committed the offenses charged, should have been admitted to refute the charges and the evidence against him.

(b) The decision by the Kentucky Supreme Court conflicts with the opinion of the United States 7th Circuit Court of Appeals on the admissibility of this type of expert testimony and presents an important question of Federal Constitutional Law that should be decided by this Court.

Other than this Court's denial of certiorari in *Romero*, supra, at 529 U.S. 1011 (2000), this Court has not addressed the issue of the admissibility of the type of expert testimony offered by Dr. Gardner on behalf of a defendant in a sexual abuse case. The issue presented by this case is particularly compelling because there was no evidence against the petitioner other than his irrelevant inflammatory statement, which obviously was intended to inflame the jury to decide guilt on its content rather than the facts of the case, and the uncooberated, admittedly inconsistent, testimony of a child witness. The interplay of a defendant's 6th Amendment right to present evidence to refute the charges and evidence against him and his right to due process and a fundamentally fair trial under the 14th Amendment are particularly imperative under this factual situation and should be decided by this Court.

Resolution of this issue is particularly important in Kentucky in regard to 6th and 14th Amendment Constitutional Rights in view of this Court's decision in *Crane v. Kentucky*, 476 U.S. 683 (1986). In *Crane*, supra, this Court reversed the Kentucky Supreme Court for its refusal to permit a juvenile defendant to introduce testimony describing the length of his interrogation and the manner in which it was conducted holding that such a denial violated the defendant's 6th and 14th Amendment rights. Quoting *Crane*, supra, at 690-691:

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers* v. *Mississippi*, *supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington* v. *Texas*, 388 U.S. 14, 23 (1967); *Davis* v. *Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California* v. *Trombetta*, 467 U.S., at 485; cf. *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984) ("The Constitution guarantees a fair trial

largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273 (1948); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." *United States* v. *Cronic*, 466 U.S. 648, 656 (1984). See also *Washington* v. *Texas*, *supra*, at 22-23."

The same is true in this case. Denial of petitioner's motion to continue his trial to obtain another expert witness to replace Dr. Gardner deprived petitioner of the opportunity to present a complete defense, other than his own bare denial, to the evidence against him, which solely rested on the child's uncooberated and inconsistent testimony and his irrelevant but provocative, inflammatory taped statement.

(c) The decision of the Kentucky Supreme Court on the admissibility of this type of expert testimony as a fundamental right under the 6th and 14th Amendments to the United States Constitution is not only in conflict with relevant decisions of the U.S. 7th Circuit Court of Appeals but also with other decisions by the Kentucky Supreme Court.

The issue presented addresses the defendant's 6th Amendment rights made applicable to the Commonwealth of Kentucky through the Due Process Clause of the 14th Amendment to the United States Constitution. Kentucky cases on this issue are at best, inconsistent, if not incomprehensible.

In *Commonwealth v. Rose*, 725 S.W.2d 588 (Ky. 1987), the Kentucky Supreme Court permitted the testimony of a registered nurse, who was offered as an expert to testify for the defense about the battered wife syndrome, to explain and discuss the syndrome. The court, however, excluded her opinions and conclusions that the defendant was suffering from the syndrome on the basis that she was not a psychiatrist or clinical psychologist and that such testimony would violate the "ultimate issue" prohibition. *Rose*, supra, at 590-592. *Commonwealth v. Craig*, 783 S.W.2d 387 (Ky. 1990), expressly overruled *Rose*, supra, permitting the Director of the YMCA Spouse Abuse Center in Lexington, Kentucky, with a Masters Degree in Counseling, to be qualified as an expert and to express her opinion as to whether the defendant was suffering from the battered spouse syndrome *Craig*, supra, at 389. *Dyer v. Commonwealth*, 816 S.W.2d 647 (Ky. 1991) overruled both *Rose*, supra and *Craig*, supra, opining that "In the present case, in the event of a retrial no evidence should be admitted, and no argument permitted, characterizing the appellant as a 'pedophile' or suggesting that he suffers from 'pedophilia', **unless** there is proof from an expert on the subject qualified to express an opinion about the appellant's mental condition. *Dyer*, at 654 (Emphasis added). Clearly, the Opinion in *Dyer*, supra, invited the proffered testimony of Dr. Gardner in an appropriate case.

However, in *Tungate v. Commonwealth*, 901 S.W.2d 41 (Ky. 1995) the Kentucky Supreme Court affirmed the trial court's exclusion of Dr. Gardner's testimony relying almost solely on its opinion in *Pendleton v. Commonwealth*, Ky., 685 S.W.2d 549, 553 (Ky. 1985) which prohibited such testimony as an opinion on the "ultimate fact". In *Tungate*, supra, the court distinguished its opinion in *Dyer*, supra, on the basis that such evidence was insufficient under the "Fry" test as well as the *Daubert* criteria, which was decided while *Tungate* was on appeal to the Kentucky Court

of Appeals, even though no *Daubert* hearing was held. *Tungate*, supra, 43-44. The Kentucky Supreme Court in *Stringer*, supra, at 891, which was decided after *Tungate*, departed from the "ultimate issue" rule, which was the underlying basis for the rejection of Dr. Gardner's testimony in *Tungate*, opining that:

> "We now once again depart from the "ultimate issue" rule and rejoin the majority view on this issue. Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702. Brown v. Commonwealth, supra, and Alexander v. Commonwealth, supra, are overruled insofar as they hold otherwise."

Under these decisions, it is clear that Dr. Gardner's testimony should have been admitted by the trial court for the reasons previously stated. The Kentucky Supreme Court, however, relied heavily on the trial court's discretion in utilizing the *Daubert* criteria to analyze the admissibility of proffered expert testimony opining that such was within the sound discretion of the trial court. (App., pp. A9-A10) However, the trial record shows that the trial court made a clearly arbitrary decision in denying petitioner's motion for a continuance opining that Dr. Gardner's testimony "...is so outside the realm of the proof required to show that these crimes were committed and that this Defendant committed them, [they] should not under any circumstance be admissible." (TP, Vol. I, p. 25) This statement alone confirms the arbitrary nature of the trial court's decision. The weight given the trial court's decision, by the Kentucky Supreme Court, was clearly misplaced under its own

analysis set out above, for the admissibility of such evidence.

Petitioner respectfully submits that Certiorari should be granted because Dr. Gardner's testimony, especially regarding the characteristics of a pedophile and his testimony that petitioner's taped statement was not indicative of either a sexual disorder or a proclivity to commit sexual offenses such as the ones charged, should have been admissible and a continuance granted to petitioner to obtain another equally qualified expert to refute the charges and evidence against him. The denial of petitioner's motion for a continuance, coupled with the provocative and highly prejudicial taped statement that was admitted into evidence and the bare assertions of a child witness which are, at best, admittedly uncooberated and inconsistent and are facially improbable, constituted a denial of petitioner's constitutional rights under the 6th and 14th Amendments to the United States Constitution guaranteeing to him the right to present a complete defense to the charges and evidence against him and a fundamentally fair trial.

CONCLUSION

For the foregoing reasons, Petitioner, William Edgar Bowen, Jr., respectfully urges the Court to issue a Writ of Certiorari to the Supreme Court of Kentucky.

Respectfully submitted,

JOHN K. CARTER
P.O. Box 205
2811 South Hwy 53
LaGrange, Kentucky 40031
(502) 225-0202
Counsel of Record for Petitioner

RENDERED: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

2003-SC-0744-MR
(2002-CA-0004)

WILLIAM BOWEN, JR. - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

Appeal from Bullitt Circuit Court
Honorable Thomas Waller, Judge
2002-CR-0066

MEMORANDUM OPINION OF THE COURT
—AFFIRMING

Appellant, William E. Bowen, Jr., was convicted by a Bullitt County Circuit Court jury of first-degree sexual abuse and first-degree sodomy. Appellant waived jury sentencing and accepted the Commonwealth's recommended sentence of five years' imprisonment for the sexual abuse charge and twenty years' imprisonment for the sodomy charge, to be served concurrently. Appellant appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). He assigns the following trial court errors: (1) improper denial of a motion to suppress his taped statement to police, (2) failure to allow Appellant to play his taped statement to the jury during voir dire and during opening statements, (3) failure to grant a continuance to secure a new expert witness, (4) failure to grant a directed verdict in his favor, and (5) improper denial of his motion to introduce a posed photograph into evidence. For the reasons set forth herein, we affirm.

Facts

Appellant worked second-shift as a paint mixer while his wife, Myrtle, ran a daycare business out of their home. One of the children, J.S., was cared for by Myrtle from age two until age twelve. In fact, J.S. continuously visited the Bowen home even after the formal childcare agreement was terminated; her last visit occurred in December of 2001. Some three months later in March of 2002, Trooper Jonathan Tapp of the Kentucky State Police interviewed J.S. concerning allegations of sexual abuse she had made to her mother. The interview occurred at the offices of the Cabinet for Families and Children, with Mary Ellen Murray, a social worker, present. At the conclusion of the interview, J.S. executed a handwritten statement in which she wrote that Mr. Bowen masturbated on her stomach. She did not mention any other inappropriate acts in the handwritten statement.

Later the same day, Trooper Tapp and Ms. Murray went to the Bowen home to interview Appellant. According to Trooper Tapp's time log, they were at the Bowen home for about two hours. Trooper Tapp and Appellant, however, present substantially different accounts of the meeting. According to Appellant, a brief tour of the home was followed by a high-pressure interrogation session. Trooper Tapp, however, denies that he conducted an interrogation and described the visit as an informal questioning. At any rate, the meeting ended after Appellant gave a ten minute taped statement in which he answered questions posed to him by Tapp. Trooper Tapp testified that he informed Appellant prior to taking the statement that he was not in custody and that he was free to refuse to answer any questions, though Tapp did advise Appellant of his rights at the outset of the recorded statement. Prior to trial, Appellant moved to suppress the taped statement; the motion was denied.

At trial, J.S. testified that Appellant sexually molested her in several ways. First, she alleged that when she was five years old Appellant came into his son's bedroom where

J.S. was napping, masturbated in her presence, and ejaculated on her stomach. She further testified that Appellant kept sexually explicit magazines in that bedroom. Second, she related an incident that occurred when she was six or seven years old. J.S. stated that while she was playing under the kitchen table with a dog, Appellant forced her to perform oral sodomy. She recounted that he was wearing a pair of green shorts at the time. Third, J.S. testified that Appellant occasionally would make her leave the door open when she used the restroom. Fourth, J.S. recounted a story told to her by Appellant that a nine-year-old girl offered to have sex with him. Fifth, J.S. testified that Appellant would frequently touch her buttocks while sitting on the couch.

Appellant testified and denied each of J.S.'s allegations, except for telling J.S. about the young girl who offered to have sex with him. He admitted to occasionally masturbating in his son's room, but emphasized that the only did so when he believed he was alone. In addition to Appellant's denial, he presented numerous witnesses to testify on his behalf. Most of these witnesses were the parents of children who had been cared for by Appellant's wife and testified that they had never seen or suspected any impropriety in the home.

The jury found Appellant guilty of both the sexual abuse charge and the sodomy charge. Appellant waived jury sentencing and was sentenced to five years imprisonment for the sexual abuse charge and twenty years' imprisonment for the sodomy charge, to be served concurrently. This appeal followed.

Motion to Suppress

Appellant argues that the trial court erred in admitting his taped statement. Prior to trial, defense counsel moved to suppress the statement, arguing that it lacked relevancy or, in the alternative, that any probative value was outweighed by its inflammatory effect. Following a hearing, the motion was denied. A renewed motion was also denied. On appeal, Appellant claims the statement is irrelevant because it reveals only his proclivity for mastur-

bation, which does not tend to prove an element of the crimes charged. Appellant also asserts that the statement lacked "time relevance"; that is, there is no evidence that Appellant's taped statements refer to the time of the alleged offenses. Finally, Appellant argues that, regardless of any potential relevancy, the taped statement nonetheless fails the probative versus prejudice balancing test required by KRE 403.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. This Court has elaborated: "To show that evidence is relevant, only a slight increase in probability must be shown." Blair v. Commonwealth, 144 S.W.3d 801, 808 (Ky. 2004). Moreover, the decision whether to admit or exclude evidence is left to the sound discretion of the trial court, and will not be reversed absent a showing of an abuse of that discretion. Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994).

Upon review of the record, we conclude that Appellant's taped statement contained information probative of the crimes charged and therefore was properly admitted. The allegation underlying the sexual abuse charge was that Appellant had masturbated and ejaculated on J.S. while she was napping in his son's room. During

the taped interview, Appellant discusses his proclivity for masturbation, his practice of masturbating in his son's room, and J.S.'s habit of napping in that same room. In fact, when asked by Trooper Tapp if it was possible that he had unknowingly masturbated while J.S. was napping in the room, Appellant admits that it was "very possible." Moreover, Appellant's admission that he stored his pornographic materials in his son's room corroborated a portion of J.S.'s statements to Trooper Tapp, in which she identifies the son's bedroom as where Appellant kept pornographic magazines. Due to the nature of the allegations against Appellant, the taped statement - in which he ad-

mits an ongoing practice of masturbating in the same room where J.S. claims he ejaculated on her - more than satisfies the minimal threshold of relevancy.

Furthermore, we are not persuaded by Appellant's claim that the statement lacked "time relevance." Appellant argues that he gave the statements to Trooper Tapp under the belief that Trooper Tapp was referring to J.S.'s most recent visit to his home, in December of 2001. According to Appellant, statements concerning acts that occurred seven to ten years after the alleged crimes lack probative value.

Appellant accurately notes that the taped statement itself contains no reference to the date when the crimes allegedly occurred, nor does Appellant specify whether he was answering questions about acts that had occurred recently or several years prior. However, Appellant fails to recognize that the taped statement also does not conclusively rule out the possibility that he was discussing his personal practices at the time the abuse allegedly occurred. Thus, because the jury could have reasonably concluded that Appellant was discussing the past, the statement is probative of the sexual abuse charge. Furthermore, during the suppression hearing, Trooper Tapp was specifically questioned on this "point and noted that, prior to taking the statement, Appellant said that he masturbated in the bedroom "all the time" and during "the same time that [J.S.] was napping in there." In light of this testimony and the varying conclusions that could legitimately be drawn from Appellant's statements, it cannot be said that the trial court abused its discretion in admitting the statement for the jury's consideration. The alleged "defect" of which Appellant complains - the lack of a defined time frame to his admissions - relates more to the weight of the evidence, not its admissibility. See Sawhill v. Commonwealth, 660 S.W.2d 3, 5 (Ky. 1983).

Alternatively, Appellant asserts that the taped statement should have been suppressed because any probative value was outweighed by its prejudicial effect. KRS 403 provides that otherwise relevant evidence may be excluded

if "its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues or misleading the jury." We recognize that evidence of masturbating or other sexual preferences is highly personal, and may at times be unduly prejudicial. See e.g. Chumbler v. Commonwealth, 905 S.W.2d 488 (Ky. 1995). However, KRE 403 requires that we consider, the prejudicial effect of such information weighed against the probative value of the evidence. We reiterate that the sexual abuse charge alleged that Appellant masturbated in front of and ejaculated on J.S. Considering the circumstances, it is not unreasonable to question Appellant about masturbation, and whether he masturbated in his son's bedroom, as J.S. alleged. Prejudice is that which is unreasonable and unnecessary. Partin v. Commonwealth, 918 S.W.2d 219, 223 (Ky. 1996). Accordingly, we find that the taped statement was sufficiently probative of the crimes charged, and was permissible pursuant to both KRE 401 and KRE 403.

Finally, Appellant argues that his statement is inadmissible under KRE 404(b), which prohibits "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show conformity therewith." We disagree. The Commonwealth did not admit Appellant's taped statement as evidence of his habit of masturbating, in order to show action in conformity with that habit. Rather, the Commonwealth admitted Appellant's statements as a qualified confession to the allegations.

The decision whether to admit or exclude evidence is left to the sound discretion of the trial court. Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994). We will not reverse its decision absent proof on the record that the trial court abused its discretion. Id. An abuse of discretion is not merely an error of law or judgment, but is an unreasonable exercise of arbitrary or biased judgment. Id. The facts of this case do not demonstrate such an error.

Voir Dire and Opening Statements

Appellant next argues that the trial court erred in prohibiting him from playing his taped statement to prospec-

tive jurors during voir dire. Appellant sought to play the tape, to determine if any juror would find Appellant guilty based on the taped statement even though it did not contain an express admission of guilt. He also believed that playing the tape prior to trial would lessen its prejudicial impact. Additionally, Appellant claims he was prejudiced by the trial court's refusal to allow him to play the tape during his opening statement.

The trial court has broad discretion in overseeing voir dire. Woodall v. Commonwealth, 63 S.W.3d 104,118 (Ky. 2001). The purpose of voir dire is to determine whether a juror's mind is initially free from bias. Shegog v. Commonwealth, 142 S.W.3d 101, 110 (Ky. 2004). It is not a proper function of voir dire, however, to have jurors indicate in advance or commit themselves to certain ideas and views before examining the evidence. Woodall, 63 S.W.3d at 116. In seeking to play the tape to the jury, Appellant attempted to secure improper commitments from jurors. We note that Appellant does not argue that he otherwise was precluded from asking questions of the panel or from exercising challenges against jurors who might have been biased against his case. There was no error.

Likewise, the purpose of an opening statement is to explain to the jurors the issues they will encounter so that they may understand the evidence as it is introduced. Brummitt v. Commonwealth, 357 S.W.2d 37, 41 (Ky. 1962) (quoting Lickliter v. Commonwealth, 60 S.W.2d 355 (Ky. 1933)); RCr 9.42. Appellant's admitted goal in playing the taped statement - to diminish its prejudicial effect - exceeded this purpose. Furthermore, Appellant's recorded statement amounts to testimony, and this Court has previously determined that a witness's prerecorded testimony cannot be played during opening statements. Fields v. Commonwealth, 12 S.W.3d 275, 281 (Ky. 2000). There was no error.

Motion for Continuance

Appellant next argues that the trial court erred in denying his motion for continuance. Appellant had retained

Dr. Richard A. Gardner to testify that Appellant does not exhibit any psychological signs of pedophilia. Additionally, Dr. Gardner would testify that masturbation is not a deviate sexual behavior indicative of any inclination to commit a criminal sexual offense. The trial court scheduled a Daubert hearing on the morning of trial, May 27, 2003, to determine the admissibility of Dr. Gardner's testimony.

Unfortunately, Dr. Gardner became extremely ill in the days leading up to the trial and died on May 25, 2003. Appellant's counsel did not know of Dr. Gardner's death when he appeared in court on May 27 for the Daubert hearing. He had been made aware the previous day, however, that Dr. Gardner's illness prevented him from testifying that day and accordingly moved for a continuance. To this motion, Appellant's counsel attached an affidavit outlining Dr. Gardner's proposed testimony. During a court recess, Appellant's counsel learned that Dr. Gardner had passed away. Defense counsel renewed the motion for a continuance to allow him to secure another expert who would offer similar testimony. The court held a hearing on Appellant's motion and ultimately refused to grant a continuance. Appellant now argues that failure to grant his motion for continuance denied him his constitutional right to present evidence to refute the charges against him. Ky. Const. § 11, U.S. Const., Amends. VI, XIV. He also argues that the court erred in not holding a Daubert hearing on the admissibility of Dr. Gardner's testimony. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786,125 L. Ed. 2d 469 (1993). We disagree.

At the outset, we determine that a Daubert hearing was held despite Appellant's arguments to the contrary. In fact, the trial judge unequivocally indicated when the hearing commenced: "We are going to proceed with the Daubert hearing on the Commonwealth's testimony and be subject to cross examination by the defense." The trial court then reviewed Dr. Gardner's lengthy affidavit, outlining his proposed testimony, Dr. Gardner's lengthy report, and controlling case law. In essence, Dr. Gardner's proposed testi-

mony was that Appellant did not manifest the signs of pedophilia and therefore was unlikely to have committed the crime. Relying especially on this Court's decision in Tungate v. Commonwealth, 901 S.W.2d 41 (Ky. 1995), the trial court concluded that Dr. Gardner's testimony was inadmissible because it lacked a scientific basis, and because testimony as to whether Appellant was a pedophile was not relevant to the question of his guilt of the crimes charged.

A trial court has "wide latitude in deciding how to test an expert's reliability and in deciding whether or when special briefing or other proceedings . . . is needed to investigate reliability." Dixon v. Commonwealth, 149 S.W.3d 426, 430 (Ky. 2004) (emphasis in original). The court may rule on the admissibility of the expert's testimony when the trial record is "complete enough to measure the proffered testimony against the proper standards of reliability and relevance." Commonwealth v. Christie, 98 S.W.3d 485, 488 (Ky. 2002) (quoting Jahn v. Equine Services P.S.C., 233 F.3d 382, 393 (6th Cir. 2000)). Usually, such a record will consist of "proposed expert's reports, affidavits, deposition testimony, existing precedent, and the like." Christie, 98 S.W.3d at 488-89.

In this case, the trial court had a sufficient record before it to conduct a Daubert hearing and rule on the admissibility of Dr. Gardner's testimony. As is recommended in Christie, the court examined an affidavit containing Dr. Gardner's proposed testimony, considered Dr. Gardner's lengthy report, and looked to existing precedent in Tungate v. Commonwealth, 901 S.W.2d 41 (Ky. 1995). In Tungate, the trial court considered the admissibility of testimony by the very same Dr. Gardner that the defendant was unlikely to have committed a sexual crime against a minor because he did not have the psychological profile of a pedophile. The court rejected this testimony because such propensity testimony is an impermissible comment on a defendant's guilt or innocence. Id. at 43. Additionally, the court found that Dr. Gardner's testimony lacked a scien-

tific basis. Id. The trial judge in the present case was well aware of Tunqate and its implications as he considered the admissibility of Dr. Gardner's testimony. From the substantial record before it, we believe that the trial court had sufficient evidence to conduct a Daubert hearing.

This Court has previously indicated that delays in trial should only be granted when "purposeful." Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991), overruled on other grounds in Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001). Granting a continuance to allow Appellant to secure a new expert witness who would proffer similar testimony was unnecessary because Dr. Gardner's testimony was not admissible. The decision to continue a trial rests in the sole discretion of the trial judge. RCr 9.04, Williams v. Commonwealth, 644 S.W.2d 335 (Ky. 1982). We find no error. Motion for Directed Verdict

Appellant next argues that the trial court erred in denying his motion for a directed verdict at the close of the Commonwealth's case, and at the close of all evidence. He claims that J.S.'s testimony, which constituted the bulk of the evidence against him, was not credible enough to prove his guilt beyond a reasonable doubt.

Appellant acknowledges that simple discrepancies and changes regarding minor details of a child victim's testimony are matters of credibility to be assessed by the jury. Appellant, however, argues that the quality and quantity of inconsistencies in J.S.'s testimony rendered it completely incredible and insufficient to support a verdict of guilt. We have reviewed J.S.'s testimony and examined the numerous portions to which Appellant directs our attention. Without detailing every citation of inconsistency, it is sufficient to state that J.S. gave testimony that conflicted with her prior statements to Trooper Tapp and Ms. Murray, and that her testimony on the second day of trial conflicted somewhat from her prior day's testimony.

In reviewing the denial of a motion for directed verdict, we must determine if "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. Only

then is the defendant entitled to a directed verdict of acquittal." Commonwealth v. Benham, 816 S.W.2d 186,187 (Ky. 1991). A rational trier of fact could have believed, based on J.S.'s testimony, that Appellant had committed first-degree sexual abuse and first-degree sodomy, as J.S. unequivocally identified Appellant as the perpetrator. In cases where the parties essentially engage in a "swearing match "it is the jury's responsibility to evaluate the credibility of the witnesses and give due weight to their testimonies. Cobb v. Commonwealth, 105 S.W.3d 455, 458 (2003). Ultimately, it is the jury's responsibility to evaluate the evidence before it and reach a verdict based on that evidence. Morton v. Commonwealth, 817 S.W.2d 218 (Ky. 1991). Because the jury had sufficient evidence to find Appellant guilty of the crimes charged beyond a reasonable doubt, the trial court did not err in denying Appellant's motion for directed verdict.

Introduction of Posed Photograph

Appellant's final argument is that the trial court erred in precluding him from introducing a posed photograph of him seated at a kitchen table where the alleged sodomy took place. Appellant wanted to introduce this photograph to show that the design of the table made it impossible for the sodomy to have occurred as alleged by J.S. Appellant admits that it is not the same table under which the act allegedly occurred, but claims its design is the same. The court refused to allow the introduction of the photograph, noting that it was not "the exact same table."

We last considered the issue of posed photographs in Gorman v. Hunt, 19 S.W.3d 662 (Ky. 2000). The defendant in Gorman attempted to introduce a posed photograph purporting to reconstruct an automobile accident. Id. at 665. In holding that posed photographs may sometimes be admissible, we encouraged trial courts to carefully scrutinize posed photographs to prevent deception and misrepresentation. Id. at 669. The trial court holds broad discretion, in accepting or rejecting posed photographs. Id. at 667. Its decision will not be disturbed on appeal absent a clear

showing of abuse of discretion. Id. Especially in light of Appellant's admission that the picture was of a different table, the trial court did not abuse its discretion by prohibiting introduction of the photograph.

For the foregoing reasons, the judgment of the Bullitt Circuit Court is affirmed. All concur.

COUNSEL FOR APPELLANT:
John K. Carter
P.O. Box 205
2311 South Highway 53
LaGrange, KY 40031

COUNSEL FOR APPELLEE:
Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1 024 Capital Center Drive
Frankfort, KY 40601-8204

RENDERED: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

2003-SC-0744-MR

WILLIAM BOWEN, JR. - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

On Appeal from Bullitt Circuit Court
Honorable Thomas Waller, Judge
No. 2002-CR-0066

ORDER DENYING PETITION FOR REHEARING

The petition for rehearing filed by appellant, William E. Bowen, Jr., is hereby DENIED.

All concur.

Entered: December 22, 2005.

/s/ [illegible]
Chief Justice